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SUPREME COURT, U. S.

No. 1021

IN THE

Supreme Court of The United States

OCTOBER TERM, 1957

WILLMUT GAS & OIL COMPANY,
Petitioner,

v.

UNITED GAS PIPE LINE COMPANY, C. HUFFMAN LEWIS,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS FLETCHER
11th Floor Esperson Bldg.
Houston 2, Texas

C. HUFFMAN LEWIS
P. O. Box 1707
Shreveport, Louisiana
Attorneys for Respondents

W. O. CRAIN
General Counsel
United Gas Pipe Line Company
Box 1407
Shreveport, Louisiana

AVERY & PUTNAM
Box 1407
Jackson, Mississippi

BRUNINI, EVERETT, GRANTHAM & QUIN
Box 1213
Jackson, Mississippi
Of Counsel

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COUNTER STATEMENT

I.

RELATIONS BETWEEN UNITED AND WILLMUT

Since 1940, United, a Natural Gas Company, had been delivering gas in interstate commerce to Willmut, a local distributor, at a rate of 30¢ per MCF fixed by Order of the Commission as Rate Schedule No. 48 (R. Ex. Q, Vol. 2, United's Exhibits).[1] On March 20, 1943, in Docket G-148, pursuant to Commission's Order a reduced rate of 25¢ was filed and superseded the 30¢ rate (R. Ex. R-1, Vol. 2, United's Exhibits).

On August 20, 1943, a contract was entered into calling for the rate of 25¢ per MCF, with delivery of gas to be

[1] Filed with this Court in original form by Willmut were United's exhibits.

made by United to towns, cities and farm taps serviced by Willmut, which was filed and approved by the Commission as Rate Schedule No. 73. These deliveries were made along a 90 mile stretch of United's system, the northern point of delivery being East Jackson, and the southern point being Hattiesburg, both in Mississippi. This 90 mile line was a part of United's integrated, interconnected system which extended over several states, and through which gas from Texas, Louisiana and Mississippi was transported interstate to various points in said states and also to Alabama and Florida.

II.

DOCKET G-1158 BEFORE THE COMMISSION

A. Background and Contentions of Parties.

On August 5, 1947, United contracted with Mississippi Power & Light Company, the local distributor in Jackson, Mississippi, for a rate of 17½¢ per MCF. This contract was approved by the Commission and became the filed rate (R. 21, 202).

In 1948, in Docket G-1158, Willmut filed a Complaint pursuant to Section 5(a) of the Natural Gas Act (R. Ex. A, Vol. 1, United's Exhibits), asserting that its contract rate of 25¢ was preferential and discriminatory in view of the 17½¢ rate at Jackson, and prayed: that the Commission exercise its jurisdiction; that it determine the reasonable rate for the future, define the discriminatory period and grant reparations.

Willmut's consistent position in G-1158 was that all gas sold and delivered to it was interstate gas transported through the integrated, interconnected, interstate facilities of United which had been formally certificated by the Commission. Further, that this sale was a single sale under one

contract within the exclusive jurisdiction of the Commission.

United contended it had rearranged its facilities so that it was currently serving gas to Willmut from the Mississippi Gwinville gas field, that such was intrastate gas and therefore not subject to the jurisdiction of the Commission. United conceded, however, that the delivery to Willmut at East Jackson was entirely interstate gas (R. Ex. B, Vol. 1, United's Exhibits).

B. The Examiner's Decision.

At the hearing it was proved by Willmut: first, that United had not obtained authority to abandon its interstate service; second, that the gas was a single sale under one contract and was composed of commingled out of state and Gwinville gas save that at East Jackson it was composed only of out of state gas.

The Examiner (R. Ex. C, Vol. 1, United's Exhibits) adjudicated: that the sale to Willmut was a single bulk sale made under one contract; that the out of state gas delivered at East Jackson as well as the commingled out of state and Gwinville gas delivered at other points was solely interstate; that the introduction of local gas did not destroy or change the interstate character of this single sale under one contract; that the proportion of out of state and Gwinville gas was immaterial; that United had not obtained permission to abandon the sale of interstate gas or to rearrange its system as was done; that even after such rearrangement the line was interconnected with the remainder of United's interstate pipe line system by a valve which acted automatically by the rise and fall of line pressure; that the Jackson-Hattiesburg line served two essential functions in United's coordinated pipe line network, (1) it provided a means by which continuous and adequate gas service was

automatically assured all delivery points, regardless of whether gas was produced within or without the State, and (2) it transported in interstate commerce not only out of state gas but also gas originating in the Gwinville Field to points in Mississippi, Alabama and Florida. Further that the single bulk sale to Willmut was a sale solely in interstate commerce, subject to the exclusive jurisdiction of the Commission, and nothing had transpired to destroy such exclusive jurisdiction. Finally, that neither reparations nor damages could be granted under the Natural Gas Act, nor the lawfulness of past rates determined, but the Examiner ordered United for the future to sell at the 17½¢ rate instead of the former 25¢ rate.

C. The Commission Affirmed the Examiner.

The Examiner's decision was reviewed by the Commission and, upon express consideration, affirmed (R. Ex. D, Vol. 1, United's Exhibits). Specifically, the idea of reparations was rejected and the Commission refused to determine the lawfulness of past rates. As to jurisdiction, the Federal Power Commission held that United was a natural gas company within the meaning of the Act:

> "It is engaged in the transportation and sale for resale of natural gas in interstate commerce. It transports by means of its integrated pipe line system natural gas produced from fields in Texas, Louisiana, and Mississippi and delivers and sells it to industrials, other pipe lines, and distribution companies, including Willmut, in the foregoing states and also in Alabama and Florida." (at p. 5, 6.)

Also,

> "As we have seen, United conceded that the sale to Willmut was one 'in interstate commerce' for resale and subject to regulation prior to that date. The cir-

cumstance that only a relatively small amount of gas has moved in the line since then is a direct consequence of the system rearrangements made by United without the permission required by Section 7(b). The Commission's plenary jurisdiction over the Willmut sale is unaffected by those unauthorized system rearrangements. The quantity of interstate gas delivered under presently existing conditions is therefore immaterial. In any event, as Pennsylvania Water & Power Company v. Federal Power Commission, 343 U.S. 414, cited by the Examiner, holds, Federal rate authority applies to all electricity sold despite the fact that it is made up of interstate energy, together with that locally produced." (at p. 15.)

Willmut sought rehearing, reiterating its position that the Commission had jurisdiction but again demanding reparations (R. Ex. E, Vol. 1, United's Exhibits). United also asked for rehearing (R. Ex. F, Vol. 1, United's Exhibits). Both were denied.

Section 19(b) of the Natural Gas Act offered the only method of judicial review. Neither United nor Willmut appealed. Thus, the Order became final.

Complying, United began serving Willmut at the 17½c rate. Shortly thereafter United filed notice of increase of rates to 25c to both the Jackson distributor and to Willmut.[2]

III.

PROCEEDINGS IN THE STATE COURTS

A. In the Chancery Court, #16,244.

In 1953, Willmut filed this suit (R. 4) against United in the Chancery Court of Forrest County, Mississippi, setting up the same facts it had enumerated in G-1158 and asked

[2] This increase proceeding with other proceedings resulted in agreed settlement rates accepted by Willmut and approved by the Commission. Opinion 277, 13 FPC .

such State Court to award reparations. The only material difference between the Complaint filed with the Commission and the Complaint in the Chancery Court is in Willmut's effort here to separate artificially this single bulk sale of gas, and to recover damages only as to that part of the gas which originated in the Gwinville Field. Thus, the reparations sought in the State Court duplicated the reparations sought in G-1158.

United filed its Motion to Dismiss and Bar Pleas (R. 168) on the grounds, inter alia, that the issues posed by Willmut had been submitted to, and decided by, the Federal Power Commission; that the jurisdiction of the Commission is patently exclusive; that the State Courts obviously are without power and authority to grant reparations or damages on a sale for resale of natural gas in interstate commerce; that the Natural Gas Act itself does not permit the awarding of reparations; and the Commission's Order is necessarily res judicata.

B. Chancery Court's Decision.

The Motion to Dismiss and the Bar Pleas were all argued together along with Willmut's Demurrers to the Bar Pleas and its Motions to Strike the Motion to Dismiss. The Chancery Court sustained Willmut's Demurrers to the Bar Pleas and its Motion to Strike the Motion to Dismiss and also held that United's Motion to Dismiss should be overruled (R. 398). Further, it held that the Bar Pleas were insufficient in law. The effect of this decision was to hold that the Chancery Court had jurisdiction, could award reparations, and that res judicata did not apply.

C. Decision of State Supreme Court.

The State Supreme Court, after detailing the facts posed two questions for decision, the first being: "whether the

Federal Power Commission had power to regulate the rates charged by United for natural gas sold Willmut, both as to that locally produced as well as that transported into the State" (Pet. App., 7a).

As to this question, the Court held:

> "United operated a unified system enterprise which was interstate in character. The pipeline employed to serve Willmut with natural gas was an integral part of United's interconnected interstate system, all of which was duly certificated by the Federal Power Commission. The unauthorized system changes made by United in 1947, which largely, but not entirely, restricted the flow of natural gas to Willmut to local gas produced at the Gwinville Field, was ineffectual insofar as the jurisdiction of the Federal Power Commission was concerned. In addition to the fact that some interstate gas continued to commingle with the local gas supplied Willmut, the natural gas transported from without the State was available at all times to completely or partially supply the natural gas requirements of Willmut when the locally produced gas became for any reason unavailable or insufficient; and the pipes were so connected that such flow of interstate gas would automatically take place. There was but one sale by United to Willmut under one contract covering all gas sold and delivered at one price schedule which was on file with the Federal Power Commission. The commingled natural gas thus sold and delivered to Willmut was 'in interstate commerce' subject to the regulating power of the Federal Power Commission. Pennsylvania Water & Power Co. v. Federal Power Commission, 343 U.S. 414, 96 L. Ed. 1042, 72 S. Ct. 843; Connecticut Light & Power Co. v. Federal Power Commisssion, 324 U.S. 515, 89 L. Ed. 1150, 65 S. Ct. 749; Wisconsin-Michigan Power Co. v. Federal Power Commission, 197 F. 2d 472 (CCA 7). And at Willmut's request the Federal Power Commission did assert its power over the entire sale of natural gas to Willmut." (Pet. App. 7a-8a.)

The second question was: "whether Willmut can maintain a common law action for the recovery of the difference between the discriminatory rate charged by United and a just and reasonable and non-discriminatory rate for that part of the natural gas sold which was produced, transported and sold in the State of Mississippi" (Pet. App. 8a).

In answer to this question, the State Court said:

> "... Willmut contends that since the Federal Power Commission had no power to award reparations for past charges, and could only require United to file a rate schedule thereafter to be charged, that the sovereignty of the State to apply its common law and award reparations was not abrogated by the Natural Gas Act. In effect, Willmut contends that the matter of reparations was a field left open by Congress when it failed to give the Federal Power Commission power to award reparations for past charges.
>
> "We have concluded that all of the natural gas sold Willmut was subject to the jurisdiction of the Federal Power Commission; thus it was all 'in interstate commerce' as far as this second question is concerned. The problem is whether it is open for the courts to determine what the reasonable rates during the period prior to the Federal Power Commission's order should have been. The Supreme Court of the United States said in Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 95 L. Ed. 912, 341 U.S. 246:
>
> "'Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

"'We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable.'

"The power of the Federal Power Commission to regulate the price paid for natural gas transported and sold for resale in interstate commerce is exclusive, and such price is not subject to state regulation. Natural Gas Pipeline Co. of America v. Panoma Corp., et al., 99 L. Ed. 866, 349 U.S. 44. In Mississippi Power & Light Company v. Memphis Natural Gas Co., 162 F. 2d 388 (CCA 5) . . . [t]he effect of the decision . . . is that the rate schedule on file with the Federal Power Commission is the only lawful rate insofar as past rates are concerned. Cf. Glassberg v. Boyd, 116, Atl. 2d 711.

"When a sale of natural gas is subject to the power of the Federal Power Commission, or when the Commission exercises its power in a case where it has discretion, (cf. Conn. Power & Light Co. v. Federal Power Commission, supra) its jurisdiction is full and exclusive. It is not for a court to say whether Congress gave the Federal Power Commission too much or too little power over the subject of rate regulation, or whether the remedy afforded a party in a given case is complete or inadequate, measured by judicial standards.

"The jurisdiction of the Federal Power Commission having attached to all natural gas sold to Willmut, there is no residual jurisdiction for independent court action. The local component lost its intrastate character and there remained no power in the courts to apply the common law of the State" (Pet. App. 9a-10a).

Thereupon the Court reversed and dismissed the suit stating:

". . . On interlocutory appeal we ordinarily remand the case to the trial court, but in this case no additional or amended pleading could enable Willmut to maintain

its suit. It would serve no purpose to remand the cause, and final judgment will be rendered here dismissing the bill. Parker v. Board of Supervisors, 125 Miss. 617, 88 So. 172.

"Reversed and Bill Dismissed.

"All Justices Concur" (Pet. App. 11a).

The Supreme Court overruled Willmut's Suggestion of Error, one Justice dissenting on the procedural ground that Remand with instructions, rather than Dismissal, should be ordered (Pet. App. 11a).

COMMENT: It thus appears that the Presiding Examiner, the Commission and the Supreme Court of Mississippi independently reached identical conclusions resulting in the finding and holding that the single sale of natural gas here involved was solely in interstate commerce subject to the primary and exclusive jurisdiction of the Federal Power Commission, whereby, the Mississipppi Court concluded, beyond the competence of the State Court in respect of damages for any part thereof.

COUNTER QUESTION

Where the Federal Power Commission sustaining a purchaser's discrimination complaint under Section 5(a) of the Natural Gas Act adjudicates that the sale of natural gas to such purchaser is, in its entirety, interstate in character and subject to its exclusive jurisdiction (which the Mississippi Supreme Court held also conclusively appeared from this record), does a state court have power to entertain a common law cause for reparations under such purchaser's claim that a portion of such gas delivered under such sale was not interstate, but intrastate in character?

ARGUMENT

IV.

EXCLUSIVE JURISDICTION OF FEDERAL POWER COMMISSION APPEARING, COURTS WITHOUT COMPETENCE RESPECTING REPARATIONS

United's sale to Willmut, from the beginning, has been under the direct supervision and regulation of the Federal Power Commission. Its original rate to Willmut was filed with and approved by the Commission, and was subsequently reduced by the direct application of the power of the Commission in early 1943. The contract between Willmut and United in the same year was had only after submission to and approval by the federal regulatory authority. And in G-1158 this rate schedule was subsequently altered and changed by said Commission on the solicitation of Willmut. The Commission, at the behest of Willmut, continued to assert its jurisdiction despite the introduction and commingling of Gwinville gas, reaffirming the completely interstate nature of the sale and its exclusive jurisdiction.

The sale of gas to Willmut by United was a sale in interstate commerce and consequently was subject to the exclusive jurisdiction of the Federal Power Commission. The State Court has no power or authority to interfere with such sale nor to entertain any independent or collateral cause of action affecting such sale. The law on this subject is clear, convincing and complete and cannot be contravened or contradicted.

The case of *McClellan* v. *Montana-Dakota Utilities Company* (D.C. Minn., 1952), 104 F. Supp. 46, 204 F. 2d 166, cert. den. 346 U.S. 825, presents a situation strikingly similar to the case at bar. There, the Plaintiff in 1941, petitioned the Commission to reduce the rates charged it by defendant, a natural gas company. In 1946, the Commission

ruled that the rates were discriminatory and fixed the rate for the future. Plaintiff brought this suit in the District Court to recover as damages the difference between the rates paid Defendant and the new rate fixed by the Commission. "... [H]aving secured such a [Commission] determination, it claim[ed] the right to proceed with its action for damages and ask[ed] the Court to take judicial notice that the rates declared to be unlawful in 1946 and 1948 would have been unlawful in the period during which the losses occurred. . . ." (104 F. Supp. at 49).

The Court held that where natural gas rates are filed with the Commission, they become the only lawful rates which the utility can charge or accept, and, until changed by the Commission, are binding upon the plaintiff and defendant alike and upon the Court. Further, that damage could be proved only by showing the Commission would have approved some rate structure other than that existing. But "the plaintiff cannot make its assault on a matter said not to be within the jurisdiction of the Commission, when adjudication must turn on matters which are within its jurisdiction." (104 F. Supp. at 52.)

It is obvious in the case at hand, that Willmut wants to rely upon an adjudication by the Commission in G-1158 of discrimination as to interstate gas, which was within its jurisdiction, in order to make a case on gas which Willmut now claims was intrastate and not within the jurisdiction of the Commission. But, as *McClellan* teaches, this cannot be done.

In *Montana-Dakota Utilities Company* v. *Northwestern Public Service Company*, (1951) 341 U.S. 246, 251, cited in *McClellan, supra*, this Court said:

> "Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the

qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable."

McClellan cited *Mississippi Power and Light Co.* v. *Memphis Natural Gas Co.*, (1947), 162 F. 2d 388, cert. den. 332 U.S. 770. There the Fifth Circuit held: that the contract rate filed with the Commission was the legal rate; that rate-making is a legislative function; that the Courts will not interfere therewith; that to give effect to the "favored nation" clause would transfer the legislative function of rate-making from the Commission to the courts; and, if hardships result, supplication for further relief must be addressed to the Congress.

The latest expression of the Federal Judiciary on this subject is that by the same Court in *Natural Gas Pipeline Co. of America* v. *Harrington*, (1957), 246 F. 2d 915, 918, cert. den. (May 19, 1958) Nos. 803, 901, October term, 1957, wherein it stated: " . . . the Federal Power Commission by its order . . . spoke for the future only, and did not possess the power enjoyed by the Interstate Commerce Commission . . . of looking into the past and ascertaining the facts. Nor does any court possess such power for the purpose of fixing retroactively a just, reasonable and lawful rate."

In *Glassberg* v. *Boyd*, (1955), 116 Atl. 2d 711, the Delaware court asserted that since Congress intended that

neither the Commission nor the courts should have power to grant reparations, there is no residual jurisdiction remaining for independent court action.

In *Phillips Petroleum Company* v. *Wisconsin*, (1954), 347 U.S. 672, this Court held the jurisdiction of the Commission was not intended to vary from state to state depending upon the degree of state regulation and of state opposition to federal control.

Natural Gas Pipe Line Company v. *Panoma Corporation*, (1955), 349 U.S. 44, dealt with the attempt of Oklahoma to fix a minimum price to be paid for gas after production and gathering had ended. Relying on *Phillips*, this Court held "that such a sale and transportation cannot be regulated by a state but are subject to the exclusive regulation of the Federal Power Commission" (p. 45).

Federal Power Commission v. *East Ohio Gas Company*, (1950), 338 U.S. 464, declared that once a company is properly found to be a "natural gas company", no state can interfere with federal regulation thereof.

To like effect: *Illinois Natural Gas Company* v. *Central Illinois Public Service Company*, (1942), 314 U.S. 498; *United States* v. *Public Utilities Commission of California*, (1953), 345 U.S. 295; *Michigan Consol. Gas Co.* v. *Panhandle Eastern Pipe Line Company*, (6 Cir. 1949), 173 F. 2d 784; *Public Service Commission of Kentucky* v. *Kentucky Natural Gas Corporation*, (6 Cir. 1941), 119 F. 2d 417; *Citizens Gas Users Association* v. *Ohio Public Utilities Commission*, (1956), 165 OS 536, 138 N.E. 2d 383.

Obviously it is essential for there to be one national authority to govern, regulate, determine and fix rates for the delivery and sale of interstate natural gas for resale. It is equally indispensable for such authority to be exclusive. Only by a uniform standard of rate regulation can there be certainty and equality to all. Uniformity could not

be had and definitely could not be maintained were the rates to be subject to alteration by the various courts or regulatory bodies in the forty-eight states, either by direct action or by indirect attack under the guise of the recovery of reparations as damages so as to prevent discrimination. It is easy to imagine the chaotic confusion that would so quickly result from such interference no matter how well meaning.

In *Watab Paper Co.* v. *Northern Pacific Railway Co.* (8 Cir. 1946), 154 F. 2d 436, to the argument that the Minnesota statute preserved the common law remedy for the recovery of unreasonable charges because of a reservation in the Minnesota statute, the court quoted from *Abilene,*[3] as follows:

> "This clause (preserving the common law remedy) however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself" (p. 438).

Federal Power Commission v. *Hope Natural Gas Company* (1944), 320 U.S. 591, 617, states:

> "Congress has entrusted the administration of the Act to the Commission not to the courts. Apart from the requirement of judicial review it is not for us to advise the Commission how to discharge its functions."

In *Interstate Natural Gas Company* v. *Southern California Gas Company* (9 Cir., 1953), 209 F. 2d 380, the Court was asked to require defendant to transport through its pipelines gas belonging to plaintiff, and to fix the volume and rate. This the Court refused to do, since primary jurisdiction was vested in the Commission and not the Courts,

[3] *Texas Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* (1907), 204 U.S. 553

and this primary jurisdiction existed even though the natural gas company either failed or refused to file a tariff with the Commission.

From a practical standpoint, the methods afforded by the Act are sufficient to furnish proper remedy to all parties. Willmut had a perfect right the moment it felt it was being charged an unjust rate to apply for and obtain complete relief at the hands of the Commission. It did take advantage of this opportunity. It did obtain redress in that a different rate was put into effect on the basis of its petition. We might simply point out that for reasons best known to Willmut, it neglected to file its petition until 1948 although it might have done so in 1947. Likewise, Willmut, for reasons satisfactory to it, requested that its petition be consolidated with a general rate investigation then pending. Here again, delay occurred. When four years later, Willmut concluded of its own volition, and which was earlier available to it, to ask for a hearing on its petition alone, such was immediately granted and promptly disposed of by the Commission.

A delay of this type is not one that works solely against the purchaser like Willmut. It also applies to a seller as is vividly illustrated in *State Corporation Commission of Kansas* v. *Federal Power Commission* (8 Cir., 1954), 215 F. 2d 176. In this case Northern Natural suffered a loss of some $3,000,000 because the rate on file with the Commission was too low. Northern undertook to obtain reparations for this loss at the hands of the court. Just as firmly as has been held in the foregoing cases, the court disposed of its contentions, declaring: the Commission can only fix rates prospectively; the Commission lacks power to grant reparations even though a rate proves to be confiscatory; the Courts are limited strictly to the exercise of judicial review and cannot fix rates or accord reparations on account of insufficiency of rates in the past. In the process of rate

regulation the Commission determines the lawfulness of the rate and it is this determination that is subject to review by the court. There is no place in the proceeding for either the Commission or the court to award reparations.

So we find that not only the purchaser has to endure the inconvenience of following the statutory procedural course but so does the Seller, even though he may be disposing of his commodity below its value. Under ordinary circumstances the time lag is of little consequence where the parties avail themselves promptly of their remedy under the Natural Gas Act.

V.

THE MATTER IS RES JUDICATA AND WILLMUT IS ESTOPPED FROM CONTENDING TO THE CONTRARY

This record affirmatively shows, and the Mississippi court held, that the issue of whether this was an interstate or intrastate sale of gas was submitted to and decided by the Commission, whose decision became final.

Willmut filed its Complaint with the Commission alleging that this single sale was a sale in interstate commerce subject to the exclusive jurisdiction of the Commission. United, in that proceeding, alleged it was an intrastate sale because it had altered (or attempted to alter) its system to use local gas. This was the first and prime issue in the hearing. The Examiner listed it as the No. One Question thusly:

> "(1) Is United's sale to Willmut 'in interstate commerce' so as to be subject to regulation under the Natural Gas Act?" (R. Ex. C, p. 8, Vol. 1, United's Exhibits).

In discussing this basic jurisdictional question the Examiner held:

> "It is clear, however, that United, notwithstanding the operational changes made, has not succeeded in

removing any part of its sale to Willmut from Commissio. regulation. It serves Willmut under a single contract effective as a rate schedule since August 20, 1943; the service provided under that contract is considered as one bulk sale; the deliveries made at East Jackson from the Sterlington-Jackson line are comprised of interstate gas; and the deliveries from the Jackson-Hattiesburg line since February 6, 1947 have involved relatively small amounts of interstate gas, but may at any time involve much larger volumes of interstate gas by the automatic operation of United's system. In such a situation, control of United's rate to Willmut is a matter with which Congress alone is competent to deal, and is one over which the Commission has regulatory power under the Natural Gas Act" (R. Ex. C, p. 24, Vol. 1, United's Exhibits).

On review, the Commission upheld the Examiner, finding that United was a natural gas company engaged in the transportation and sale for resale of natural gas in interstate commerce, transporting by means of its integrated pipe line system natural gas produced in Texas, Louisiana and Mississippi and delivering and selling it in the foregoing states and also in Alabama and Florida. Also, it stated that *Pennsylvania Water & Power Company* v. *Federal Power Commission* (1952) 343 U.S. 414, holds that Federal rate authority applies to all electricity [gas] sold despite the fact that it is made up of interstate energy, together with that locally produced.

How strongly Willmut urged upon the Commission that this was a single unit sale in interstate commerce (a position directly contrary to the position now being taken) is disclosed in the following excerpts from its brief to the Commission:

"(b) Full jurisdiction is vested in this Commission under the Act as to, not alone the gas originating out-

side of Mississippi, but as well and as completely the gas originating in Mississippi, when as a unit the same is delivered to Willmut at its city gate in East Jackson. In short, the interstate and intrastate having been voluntarily commingled by United, and thereasto a rate published under the Act, that rate being required to be just, reasonable and non-discriminatory, embraces within the Commission's power all and every part of the intrastate gas so thus concurrently delivered" (R. Ex. D-1, Vol. 1, United's Exhibits).

And:

"When United voluntarily commingled interstate gas with intrastate gas, creating thereasto a confusion of goods and then delivered that thus commingled, all so thus received by Willmut was within the protection of the Act" (R. Ex. D-1, Vol. 1, United's Exhibits).

In the oral argument before the Examiner, Willmut's counsel ridiculed the idea that this sale was composed of anything but interstate gas (Vol. 5, p. 650, 651, G-1158).[4] We quote:

". . . And you will find, if your Honor please, that the gas pressure in the 16-inch line is higher than the gas pressure in the 8-inch line, and with that connection between the two parties United has seen fit not to install a check valve whereby the intrastate gas may be kept in, but it has installed, if your Honor please, a flow valve, whereby, when pressure is needed at Hattiesburg, it can come in from the 16-inch line or when it is in excess there at Hattiesburg it can go out. In other words, our friends have gotten installed consciously and purposely at the South end of this line under the certificate of convenience and necessity a flow valve, and the gas moves in and out at its pleasure, as Boyle's Law doth regulate.

[4] A complete set (Volumes 1 through 6) of the transcript of the hearings and oral argument before the Federal Power Commission in G-1158 were filed with this Court and constitute a part of the record.

". . . And therefore when they utilized as an essential element an equalizing valve, as your Honor's kind suggestion was, at that point, our friends can't support the declaration which they made here, apparently without question, that nobody questions that all of this gas had been intrastate gas from that time until now. It just ain't a fact, your Honor, with deference. It just ain't a fact.

"So that when we have this inflow and this outflow, as the gas law does require, with deference, that is interstate gas."

Having thus firmly established jurisdiction in the Commission and having obtained relief predicated thereon but not being successful in obtaining reparations, Willmut then brought this suit in the State Court seeking the identical reparations in part. It simply rearranged its Formal Complaint in G-1158, asserting however that it was only seeking to obtain damages at the hands of the State Court on the gas originating in the Gwinville Field which it then, for the first time, labels "intrastate gas."[5] This complete reversal of position, United contends, cannot be done. First, as has been shown, exclusive jurisdiction of this single unit sale of gas is vested in the Commission and the courts have nothing to do with it. Second, the Commission's adjudication of its jurisdiction is conclusive and is res judicata. Third, Willmut is now estopped, having successfully carried to victory the exact opposite position.

A. The matter is res judicata.

Although supported by numerous cases, the leading decision on this point is *Sunshine Anthracite Coal Company* v. *Adkins*, (1940), 310 U.S. 381. There, jurisdiction rested on whether the coal was "Bituminous Coal." The Commis-

[5] At Record page 374 is a typed comparison of the two complaints and the identity of the allegations is there prefectly visible.

sion, after hearing, held that it was. Suit was then filed in the District Court and the same issue was tendered. A plea of res judicata was sustained upon the unequivocal holding that the Commission was authorized to determine this fact upon which jurisdiction rested and such determination bound the parties. It was also pointed out that the lower court correctly held that it had no jurisdiction to determine this fact since Congress had created, for this purpose, a procedure under the Regulatory Act and "that remedy is exclusive" (p. 404).

Additional decisions to the same effect: *Adams* v. *Nagle*, (1938) 303 U.S. 532; *Butte Railway* v. *United States*, (1933) 290 U.S. 127; *Hagens* v. *United Fruit Company* (2d Cir. 1943) 135 F. 2d 842; *Dennison* v. *Payne*, (2d Cir. 1923), 293 F. 333; *Pillsbury* v. *Alaska Packers Association* (9 Cir. 1936), 85 F. 2d 758, rev. on other grounds, 301 U.S. 174; *Texas Steel Company* v. *Fort Worth*, (1931), 120 Tex. 597, 40 S.W. 2d 78; *West* v. *Standard Oil Company*, (1929), 278 U.S. 200; *Borax Consolidated* v. *Los Angeles*, (1935), 296 U.S. 10; *Zimmerman* v. *Scandrett*, (D.C. Wis. 1944), 57 F. Supp 799; *Dredge and Dock Company* v. *Brown*, (D.C. Ill. 1930) 47 F. 2d 265; *Doey* v. *Howland Company*, (1918) 224 N.Y. 30, 120 N.E. 53, cert. den. 248 U.S. 574.

Similarly, in other analogous factual situations, the Courts have reached the same conclusion. *Miles Laboratories* v. *Federal Trade Commission*, (D. C. Cir. 1944) 140 F. 2d 683, cert. den. 322 U.S. 752; *Yakus* v. *United States*, (1944) 321 U.S. 414.

B. Willmut is Estopped.

The Supreme Court of Mississippi has consistently condemned and has refused to permit a party litigant to abandon a position successfully enforced and to adopt a contrary one when it appears advantageous for him to do so.

As it stated in *Smith* v. *Smith*, (1951) 211 Miss. 481, 52 So. 2d 1:

> "We do not think that the appellants can 'blow hot' in 1947 as to the validity of the tax sale, and then 'blow cold' on the same proposition in the same court in 1949. They are estopped to question its validity under the facts here presented" (p. 6).

To like effect see *Logan* v. *Smith*, (1956) ..... Miss. ....., 91 So. 2d 707.

Federal Courts apply the same rule. *Callanan Road Improvement Co.* v. *United States* (1953) 345 U.S. 507, 513; *Davis* v. *Wakelee* (1895) 156 U.S. 680, 689; *Scarano* v. *Central R. Co. of New Jersey* (3 Cir. 1953) 203 F. 2d 510, 512-3; *Jamison* v. *Garrett* (D.C. Cir. 1953) 205 F. 2d 15, 17; *Chicago S. S. & S. B. R. R.* v. *Fleming* (7 Cir. 1940) 109 F. 2d 419, 420.

VI.

EXCLUSIVE FEDERAL JURISDICTION NOT AFFECTED BY THE PROPORTION OF OUT OF STATE AND LOCAL GAS

This Court has soundly repudiated the untenable theory that Federal Jurisdiction can be exclusive only if the volume of the interstate commodity or commerce exceeds the local component, as well as the equally unsound theory that such jurisdiction fails where the interstate component exists only in small quantities. The Commerce Clause was never so conditioned. There is no need to labor this point, which has so clearly been the subject of so many decisions. See *Connecticut Light and Power Company* v. *Federal Power Commission*, (1945) 324 U.S. 515; *Pennsylvania Water and Power Co.* v. *Federal Power Commission*, (1952) 343 U.S. 414; *Jersey Central Power and Light Company* v. *Federal Power Commission*, (1943) 319 U.S. 61; *Wisconsin-Michi-*

gan Power Company v. *Federal Power Commission*, (7 Cir. 1952) 197 F. 2d 472, cert. den. 345 U.S. 934; *State of Wisconsin* v. *Federal Power Commission*, (D.C. Cir. 1952) 201 F. 2d 183, cert. den. 345 U.S. 934; *California Electric Power Company* v. *Federal Power Commission* (9 Cir. 1952) 199 F. 2d 206, cert. den. 345 U.S. 934. De minimis presented no problem to Willmut before the Commission. It presents none here.

VII.

WILLMUT'S POSITION IS UNREAL AND UNTENABLE

Willmut's position endorsed and joined in by the amicus City of Hattiesburg is utterly without foundation either at law or in logic, because it completely ignores immutable devastating facts as conclusively demonstrated herein:

1. That the presiding Examiner, the Commission and the Mississippi Court, all adjudicated that the Commission had exclusive jurisdiction of the subject matter of this case.

2. That the Examiner, the Commission and the Mississippi Court all adjudicated that all gas sold to Willmut comprised a single sale of interstate gas and that there was no "intrastate gas."

3. That the Gwinville gas was only a commingled part of this single bulk sale, was interstate gas from the time of its introduction into United's line and such interstate character was insisted upon by Willmut and so adjudicated by the Examiner, the Commission and the Mississippi Court.

4. That the Mississippi Court held that since all gas sold in this single sale was interstate in character and thus subject to the exclusive jurisdiction of the Commission, there was no residual power left in the state to hear and deter-

mine a damage suit for reparations for past periods growing out of the interstate sale. Indeed petitioner and the amicus so recognize and confess.

Willmut and its amicus merrily build their house of cards on the fanciful assertion that this suit involves only "intrastate gas." Such an unwarranted assumption is completely unfaithful to the record and flies drastically into the teeth of the previous adjudications and all of the decisions. Having bottomed and built on this false foundation, their theories subsequently spun thereon transgress reality.

As to arbitration, here again Willmut strikes out into fairyland, blandly ignoring the fact that:

A. Willmut is now suing on an alleged common law cause of action in the Mississippi Court, but the Mississippi Court will not enforce an agreement to arbitrate nor will it allow damages for any refusual to arbitrate. *Machine Products Company* v. *Prarie Lodge* (1957), 94 So. 2d 344 (not officially reported). As to this, Mississippi law is controlling.

B. Even assuming that Mississippi law would permit the enforcement of arbitration, nonetheless Willmut here can derive no comfort from the *Mobile* and *Memphis* cases[6] (Pet 27, 29) since Willmut itself completely by-passed and eliminated arbitration by seeking and obtaining the use of the power of the Commission to fix and determine the rate and the rate is the only item contemplated to be the subject of the alleged agreement to arbitrate.

Willmut apparently places great emphasis on the case of *Peoples Natural Gas Co.* v. *Public Service Commission* (1926), 270 U.S. 550. Willmut ignores the fact that therein the Court specifically noted that Congress had not exercised

[6] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.* (1956), 350 U.S. 332; *Memphis Light, Gas & Water Div.* v. *Federal Power Commission* (D.C. Cir., 1957), 250 F. 2d 402, cert. granted No. 691, Oct., 1957 term.

its paramount power to regulate under the Commerce Clause.

In *Pennsylvania Water*, where the paramount power had been exercised, the losing parties bottomed their position on *Peoples* and its theory, which this Court directly rejected.

North Dakota v. *Amerada Petroleum Corporation* (8 Cir. 1957), 247 F. 2d 173, is not in point. There was not a sale for resale of gas in interstate commerce under any theory. There was not a single sale under one contract before the Court; but two separate sales: one in interstate commerce and filed with the Commission; the other in intrastate commerce and, of course, never filed. The Commission refused to take jurisdiction over the unfiled, separate, intrastate sale.

A casual reading of the *Hastings* cases and *Humble*[7] (Pet. 17-8), show the facts to be totally dissimilar.

Petitioners and the amicus distort the holding of *Montana-Dakota* (Pet. 14, 15; Am. br. 5, 7, 11). There reparations for past periods were sought. The majority held that no federally cognizable cause was stated because, inter alia, the Federal Power Act denied such a right. On this point the dissent agreed for it stated, " . . . Congress did not intend either court or Commission to have the power to award reparations on the ground that a properly filed rate or charge has in fact been unreasonably high or low. If that were all the complaint before us showed, we would agree that recovery of damages in a civil action would not be an appropriate remedy, and that the complaint should have been dismissed" (p. 258).

The difference between the majority and the dissent pivoted upon the view of the dissent that the allegations of

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[7] *City of Hastings* v. *Federal Power Commission* (D. C. Cir., 1955), 221 F. 2d 31, cert den. 349 U.S. 920; *City of Hastings* v. *Kansas-Nebraska Natural Gas Co., Inc.* (8 Cir., 1955), 226 F. 2d 419; *Humble Oil & Refining Co.* v. *Texas & Pacific Ry. Co.* (1955), Tex. , 289 S.W. 2d 547.

fraud and deceit allegedly prevented proper disclosure to the Commission of facts which would have produced Commission disapproval, prevented access to the Commission, and appealed to the court's equitable power in such way as to authorize a reference to, and investigation by, the Commission. These considerations do not appear here.

The conflict imputed to *Montana-Dakota*, and *Davidson* and *T.I.M.E.* (Pet. 10-11, 19); Amicus Br. 10-11), does not exist. They, unlike *Montana-Dakota*, were not suits for reparations for past periods. They were contract actions under the Tucker Act (thus Federally cognizable) for debt. The defense denied indebtedness because of unreasonableness in the rate sued for. Reference to the administrative agency of the issue of unreasonableness where such defense is made has been recognized. *Montana-Dakota* (p. 253); *United States* v. *Western Pacific R. R. Co.* (1956), 352 U.S. 59; *United States* v. *Chesapeake & Ohio R. R. Co.* (1956), 352 U.S. 77, 81. Plaintiffs in *Davidson* and *T.I.M.E.* sought to escape this defense by claiming that *Montana-Dakota* rendered any *filed* rate immune to such attack. Bluntly, both courts rejected this assertion. They went no further in their opinions.

The Motor Carrier Act (Sec. 216, 49 U.S.C.A. 316), as the Fifth Circuit emphasizes, expressly preserved common law causes such as were there involved (p. 32-3 App. to petition for writ of certiorari, *T.I.M.E., Inc.* v. *United States of America*, (1958), 252 F. 2d 178 cert. pending, Oct. 1957 term. No. 1027). The District of Columbia Circuit stated express agreement with the Fifth Circuit. *United States of America* v. *Davidson Transfer & Storage Co.*, No. 14123, decided April 24, 1958 p-8 Folio opinion, cert. pending No. 1062 Oct. 1957 term). The Natural Gas Act contains no comparable reservation. Indeed, Congressional denial was deliberate. *Montana-Dakota, supra.* It is thus

submitted that neither *Davidson* nor *T.I.M.E.* are apropos to the issues here involved.

Willmut urges that it has suffered a loss of its constitutional right to a fact trial. This position Willmut presented to the State Court. It was rejected because no fact issue has ever existed. The facts are undisputed. The only dispute has been as to the legal conclusion to be reached, namely, whether the gas was "intrastate" or "interstate." Even if a fact issue had ever been available, it was foreclosed by the solemn stipulation of the parties filed in the Court: "that this court shall consider and determine this cause on the filed record, the pleadings and the stated exhibits" (R. 487). The complaint of Willmut in the State Court averred all of C-1158 as a matter of fact.

CONCLUSION

The decision of the Court below was correct; whereby the Petition for certiorari should be in all things denied, and it is respectfully so prayed.

THOMAS FLETCHER
C. HUFFMAN LEWIS
Attorneys for Respondent

W. O. CRAIN
AVERY & PUTNAM
BRUNINI, EVERETT, GRANTHAM & QUIN
Of Counsel